IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 17, 2007

STATE OF TENNESSEE v. ROBERT LAMONT MOSS, JR.

Appeal from the Criminal Court for Davidson County
No. 2005-A-434 Mark J. Fishburn, Judge

No. M2006-00890-CCA-R3-CD - Filed December 4, 2007

A Davidson County Criminal Court grand jury indicted the defendant, Robert Lamont Moss, Jr., of two counts of aggravated kidnapping, *see* T.C.A. § 39-13-304 (2006), one count of aggravated sexual battery, *see id.* § 39-13-504, one count of aggravated rape, *see id.* § 39-13-502, and one count of theft of property, *see id.* § 39-14-103. The trial judge dismissed the aggravated sexual battery count, and the jury convicted the defendant of the remaining counts. The trial court imposed an effective sentence of 17 years. On appeal, the defendant argues that (1) the trial court erred in denying the defendant's motion to suppress the victim's identification of the defendant, (2) the trial court erred in allowing the prosecution to cross-examine the defendant about prior drug use, and (3) the trial court erred in enhancing three of the defendant's convictions. We affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Ross E. Alderman, District Public Defender; Emma Rae Tennent, Assistant Public Defender (on appeal); and Amy D. Harwell and Kyle Mothershead, Assistant Public Defenders (at trial), for the appellant, Robert Lamont Moss, Jr.

Robert E. Cooper, Jr., Attorney General & Reporter; Elizabeth B. Marney, Senior Counsel; Victor S. Johnson, III, District Attorney General; and Sarah Davis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The evidence at trial showed that the victim, Patricia Demarcus, left work on July 13, 2002, at approximately 11:30 p.m. and arrived at her home on Baxter Avenue in Nashville. A roommate, Erin Harris, was not home, and the victim's other roommate, Lauren Materi, was asleep. The victim drank "a couple of beers" and went to sleep. She awoke when Ms. Materi left at approximately 3:00 a.m. for a trip to West Tennessee but fell back asleep shortly thereafter.

At approximately 4:20 a.m., the victim was awakened by someone trying to enter the house. She went to the door, opened the door's blinds, and saw the defendant, who asked for Ms. Materi. The victim had met the defendant before when he helped move furniture for Ms. Materi, so she opened the door. When she did, the defendant started choking her. She fell to the ground, and he pulled her up by her hair. He asked her for money, and she told him that it was upstairs. Then, he forced the victim upstairs.

Once upstairs, the defendant went through the victim's purse and took approximately $160. He told the victim to tell Ms. Materi that "Chaos" was here. The defendant then took a telephone cord, tied the victim's arms behind her back, and put her in a closet. While in the closet, the victim heard the defendant ransacking the downstairs of the house. She was able to get loose and tried to escape via "hidden" steps to the attic. However, the victim was unable to "pull [the stairs] up," and the defendant saw her and pushed her to the floor onto her back. He ripped her shirt and bra, and pulled her shorts down. He asked her if she had any condoms, and she told him "No." The defendant then made her hold her knees, and he inserted his "hand" into her vagina. He then dragged her into her bedroom, forced her onto the bed, and punched her in the chest several times. He asked her where the "kilos" were and told her to tell Ms. Materi that "Chaos was [there] for his money." The defendant then dragged her to Ms. Materi's room, "hog-tied" her, ransacked that room, and left. After the victim heard the defendant's car drive off, she "laid there and cried and prayed to God and then gradually was able to get loose." She ran to her neighbor's house, and her neighbor called 9-1-1.

The testimony showed that a television, a Play Station II game system, a camera, $170, and two packs of cigarettes were missing from the house. The victim's VCR was also thrown into her front yard and broken. The testimony also showed that the shoes that the defendant wore when arrested were "consistent with the size, shape and tread" of the footprints found in the victim's kitchen. Also, the victim's emergency room doctor testified that the victim's tongue was swollen, and she had bruising around her neck, tenderness to her head, shoulders, chest, and back, and contusions to the front of the vagina.

The jury convicted the defendant of two counts of aggravated kidnapping, one count of aggravated rape, and one count of theft of property. On appeal, the defendant argues that (1) the trial court erred in denying his motion to suppress the victim's identification of the defendant, (2) the trial court erred in allowing the prosecution to cross-examine the defendant about prior drug use, and (3) the trial court erred in enhancing three of the defendant's sentences. We will discuss each issue in turn.

I. Suppression of Victim's Identification Testimony

First, the defendant claims the trial court erred in denying his pretrial motion to suppress the victim's identification of him. On August 16, 2002, the victim viewed a photographic array prepared by the police, who told her that a picture of their "best suspect" was included in the

array. After the victim indicated that she was "98 [percent] sure" in selecting the defendant's black and white photograph from the array, the police showed her a color picture of the defendant as it appeared on an employer's identification card. The victim then indicated her certainty that the defendant was the offender. The trial court found that the reliability of the victim's identification of the defendant "had already been established" before she viewed the second photograph. The court ruled that the victim's out-of-court identification and her in-court identification of the defendant were admissible.

A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, questions of credibility, the weight and value of the evidence, and the resolution of conflicting evidence are matters entrusted to the trial judge, and this court must uphold a trial court's findings of fact unless the evidence in the record preponderates against them. *Odom*, 928 S.W.2d at 23; *see also* Tenn. R. App. P. 13(d). The application of the law to the facts, however, is reviewed de novo on appeal. *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998). We review the issues in the present appeal with these standards in mind.

Law enforcement personnel make routine use of various identification procedures. With physical and pictoral lineups, a victim is asked to examine the likenesses of multiple individuals and to indicate whether the perpetrator is among those individuals presented. These are the preferred methods of identification. *See State v. Cribbs*, 967 S.W.2d 773, 794 (Tenn. 1998).

"To be admissible as evidence, an identification must not have been conducted in such an impermissibly suggestive manner as to create a substantial likelihood of irreparable misidentification." *Id.* (citing *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968)). An identification procedure that is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification violates principles of due process. *Simmons*, 390 U.S. at 384, 88 S. Ct. at 971.

In *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972), the Supreme Court identified five factors for assessing the reliability, and therefore the admissibility, of an identification. They are: (1) the opportunity of the witness to view the perpetrator at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the time between the crime and the identification. *Id.* at 199, 93 S. Ct. at 382. These factors for evaluating the reliability of an identification have been adopted in Tennessee. *See Rippy v. State*, 550 S.W.2d 636, 640 (Tenn. 1977); *Bennett v. State*, 530 S.W.2d 511, 515 (Tenn. 1975). Although it may be suggestive, an identification may satisfy due process as reliable and admissible if the totality of the circumstances so warrants. *See State v. Brown*, 795 S.W.2d 689, 694 (Tenn. Crim. App. 1990).

In the present case, the victim had an extended opportunity to see the offender during his intrusion into her home and his protracted contact with her. Some of the personal contact was

intimate in nature. Prior to opening her door to the defendant, the victim recognized him from a prior meeting. The victim expressed a high level of certainty in her initial photographic identification of the defendant. Approximately a month expired between the crime and the photographic identification procedure.

In totality, these circumstances support the trial court's determinations that the results of the identification procedure and the victim's identification of the defendant at trial were admissible. We hold that the trial court did not err in overruling the motion to suppress.

II. Prior Drug Use

The defendant claims that the trial court erred in allowing evidence of the defendant's drug use. During trial, the State moved for leave to cross-examine the defendant about his pretrial admissions that he used drugs. Following two jury-out hearings, the trial court ruled that the State could use the statements the defendant had made to a police detective to the effect that the defendant regularly used drugs. The trial court determined that the evidence was admissible as an aid in establishing identity and motive. In its findings, the trial court relied upon testimony that the intruder asked about the whereabouts of the "kilos." Additionally, the court held that "the probative value outweigh[ed] the prejudicial effect with the curative instruction," which the court gave.

Evidence of other crimes, wrongs, or acts is not generally admissible to prove that an accused committed the crime in question. Tenn. R. Evid. 404. The rationale underlying the general rule is that admission of such evidence carries with it the inherent risk of the jury convicting the defendant of a crime based upon his bad character or propensity to commit a crime, rather than the conviction resting upon the strength of the evidence. *State v. Thacker*, 164 S.W.3d 208, 239 (Tenn. 2005). The risk is greater when the defendant's other bad acts are similar to the crime for which the defendant is on trial. *Id*. at 239; *see also State v. McCary*, 922 S.W.2d 511, 514 (Tenn. 1996).

Notwithstanding the general rule, evidence of other crimes, wrongs or acts may be admissible where it is probative of material issues other than conduct conforming with a character trait. Tenn. R. Evid. 404(b). To admit such evidence, the rule specifies the following:

> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and

(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b)(1)-(4).

In reviewing a trial court's decision to admit or exclude 404(b)-type evidence, an appellate court may disturb the lower court's ruling only if there has been an abuse of discretion. *Thacker*, 164 S.W.3d at 240. Its determination is entitled to deference when it has substantially complied with the procedural requisites of Rule 404(b). *See State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997).

The trial court determined that the drug-use evidence was probative of the defendant's motive – and hence his identity and intent – based upon his erratic behavior and his demand to obtain "kilos" of cocaine. We are mindful that, at trial, the defendant contested the issue of identity. Given the circumstances and the theory of the defense, we cannot say that the trial court abused its discretion in determining that an issue other than propensity was at stake. Nor can we say that the trial court erred in holding that the probative value of the evidence outweighed the prejudicial effect. The drug-offending suggested by the evidence at issue is not similar to the assaultive and property offenses of which the defendant stands convicted.

Thus, we hold that the trial court did not abuse its discretion in admitting the evidence.

III. Sentencing

In his final issue, the defendant challenges the trial court's imposition of enhanced sentences. The trial court imposed the following sentences in the defendant's case:

Count	Offense	Sentence Range	Enhancement factors	Sentence
1	aggravated kid-napping, Class B	8-12	2, 17[1]	8

[1] At the time of the defendant's sentencing, the legislature had amended the sentencing code to address the implications of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *See* T.C.A. § 40-35-114 (2003) (promulgating factors for enhancing sentence length) (amended Pub. Acts 2005, ch. 353, § 5 (effective June 7, 2005)). Among other more substantive changes, the 2005 amendment to section 40-35-114 entailed a change in the numbering for the enhancement factors listed in the 2003 bound volume of Tennessee Code Annotated. The numbering of factors used in this opinion is the numbering used by the trial court, being the numbering that appeared in the pre-2005 version of section 40-35-114. The 2005 amendments deleted the factor previously listed as number 17. Having committed the offenses under review on July 14, 2002, the defendant was not subject to sentencing via the 2005 amendments to the sentencing code unless he "execut[ed] a waiver of [his] ex post facto protections." T.C.A. § 40-35-114 (Supp. 2005), compiler's notes. The record in the present case reflects no such waiver. Thus, the sentencing was governed by the pre-2005 sentencing provisions.

2	aggravated kid-napping, Class B	8-12	2	10
4	aggravated rape, Class A	15-25	2, 17	17
5	theft, Class E	1-3	2	2.

Enhancement factor 2 is that a "defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range," T.C.A. § 40-35-114(2) (2003) (amended 2005), and factor 17 is that the "crime was committed under circumstances under which the potential for bodily injury to a victim was great," *id.* § 40-35-114(17) (amended 2005). The trial court imposed the sentences to run concurrently, yielding an effective sentence of 17 years.

The defendant claims that the trial court misapplied the enhancement factors and that the use of one or both factors violated his Sixth Amendment right to a jury trial as articulated in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

a. State-Law Basis for Sentence Enhancement

The trial court enhanced two sentences above the statutory presumptive levels – the count (2), ten-year sentence for aggravated kidnapping and the count (5), two-year sentence for theft of property valued at $500 or less.

When the length, range, or manner of service of a sentence is disputed, it is generally the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id*. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id*. If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. The court is required to consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -103(5) (2003).

Initially, we observe that the transcript of the trial judge's sentencing determinations lacks clarity in relating the applied enhancement factors to specific counts, and as we shall discuss below, one factor was apparently misapplied. Thus, our review is de novo without a presumption of correctness.

The use of enhancement factor (2) – that the defendant had a "previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range" – is supported in the record, which reveals two prior drug convictions[2] and the defendant's admission of sustained drug use.

The use of enhancement factor (17) – that the crime was committed under circumstances under which the potential for bodily injury was great – is problematic. First, the transcript of the trial judge's oral findings indicates that he mistakenly referred to factor (13), but the language he used indicates to us that he had factor (17) in mind. That aside, however, it is unclear to what convictions he applied this factor, although he applied the factor to only two convictions. The judge stated that factor (17) applied in Counts (1), aggravated kidnapping to facilitate felony theft, *see* T.C.A. § 39-13-304(a)(1) (2003), and (4), rape aggravated by bodily injury, *see id.* § 39-13-502(a)(2). The trial court, however, had avoided applying factor (17) to Count (2), kidnapping aggravated by bodily injury, *see id.* § 39-13-304(a)(4), suggesting that the court did not intend to apply the factor to the aggravated rape count wherein bodily injury was also an element. The trial court had dismissed Count (3), causing the theft conviction alleged in Count (5) to become the *fourth* conviction, and perhaps the trial judge intended to apply factor (17) to Count (5), theft, rather than to Count (4).

At any rate, the sentencing court may not utilize an enhancement factor that is itself an element of the underlying offense. T.C.A. § 40-35-114 (2003). Bodily injury was not an element in Count (1), Class B aggravated kidnapping based upon facilitation of felony theft, and the violence with which the defendant perpetrated the initial kidnapping supports a finding of potential for bodily injury. The trial court, however, did not actually enhance the sentence in Count (1).

The application of factor (17) to the aggravated rape charge in Count (4) was error, if indeed the trial court applied the factor in sentencing on that conviction. In *State v. Marquez Winters*, No. W2001-00740-CCA-R3-CD (Tenn. Crim. App., Jackson, Oct. 15, 2002), this court held that enhancement factor (17)'s clause, "committed under circumstances under which the potential for bodily injury to a victim was great," is "essentially . . . an element of the offense" of aggravated kidnapping when bodily injury is an element. *Id.*, slip op. at 9. We believe the analogy is apt and conclude that factor (17) was embodied in the elements of the mode of aggravated rape charged in Count (4).

[2] In the sentencing hearing argument, the State referred to only one prior misdemeanor. The presentence report indicates "dispositions" of a possession of marijuana and a possession of cocaine.

Factor (17), on the other hand, is not an essential element of theft, and in the present case, the evidence showed that the defendant committed the theft under circumstances in which the potential for bodily injury was great. The factor was applicable to the conviction in Count (5).

In sum, the trial court aptly used factor (2) in enhancing the sentences in Counts (2), (4), and (5). That factor alone accounts for the relatively moderate enhancement of those sentences. Thus, the enhanced sentence in Count (4) – two years over the presumptive sentence of 15 years – is justified by the use of factor (2) alone, and we do not disturb that sentence even if the trial court used factor (17) in imposing the 17-year sentence. As noted above, the sentence enhancement for theft is likewise justified by factor (2) alone.

In conclusion, although the trial court may have misapplied enhancement factor (17), we see no state-law basis for modifying any sentence imposed by the trial court.

b. The Sixth Amendment Issue

Now, we address the *Blakely* issue.

On June 24, 2004, the United States Supreme Court released its opinion in *Blakely*, holding that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* at 301, 124 S. Ct. at 2536 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)). The "statutory maximum" to which a trial court may sentence a defendant is not the maximum sentence after application of appropriate enhancement factors, other than the fact of a prior conviction, but the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303, 124 S. Ct. at 2537. Under *Blakely*, then, the "statutory maximum" sentence which may be imposed is the presumptive sentence applicable to the offense. *See id.*, 124 S. Ct. at 2537. The presumptive sentence may be exceeded without the participation of a jury only when the defendant has a prior conviction and/or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant.

On January 22, 2007, the United States Supreme Court released its decision in *Cunningham v. California*, 549 U.S. ___, 127 S. Ct. 856 (2007), holding that California's sentencing scheme, which had numerous similarities to Tennessee's sentencing scheme, did not survive Sixth Amendment scrutiny intact under *Blakely*. Prior to the ruling in *Cunningham*, the Tennessee Supreme Court had held that a judge's enhanced sentence pursuant to Tennessee's pre-2005 sentencing regime did not amount to plain error under *Blakely*. *See State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005) (*Gomez I*); however, following on the heels of *Cunningham*, on February 20, 2007, the United States Supreme Court vacated *Gomez I* and remanded that case for reconsideration in light of *Cunningham*, *see Gomez v. Tennessee*, ___ U.S. ___, 127 S. Ct. 1209 (2007).

On remand in *Gomez*, the Tennessee Supreme Court applied the principles of *Blakely* and *Cunningham* to determine that Tennessee's pre-2005 sentencing code violated Gomez' right to jury trial. *State v. Gomez*, ___ S.W.3d ___, No. M2002-01209-SC-R11-CD (Tenn., Oct. 9, 2007) (*Gomez II*). The *Gomez II* court held that the trial court had committed plain error on constitutional grounds in applying factors for being a leader in the commission of the offenses and in possessing or employing a firearm to enhance sentences. *Id*. at ___, slip op. at 7, 10. In further conducting its plain error analysis, *see State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (approving a plain error regimen that includes a determination whether plain error review is necessary to do substantial justice), the supreme court held that the fulfillment of substantial justice required a "remand to the trial court for a *resentencing hearing* at which the trial court will have an opportunity to determine the full scope of the Defendants' criminal histories and to consider whether imposition of the maximum sentence on all convictions is appropriate." *Gomez II* at __, slip op. at 9-10 (emphasis added). As part of the rigors of determining whether to notice plain error and, in particular, whether the mandate for substantial justice required the notice, the supreme court indicated its inability to fathom the trial court's weighing of the prior-conviction factor *vis a vis* the *Blakely*-infirm factors because the "record in this case as to the Defendants' criminal histories is not sufficiently well-developed for us to determine the proper sentences based on this enhancement factor alone." *Id.*

In the present case, the defendant did not raise the *Blakely* issue prior to appeal; however, we have conducted a de novo review of the defendant's sentencing as mandated by Tennessee Code Annotated section 40-35-401(d), and because of lapses or error as defined by state law, we have done so without a presumption of correctness. In the process of our de novo review, we are mindful of the applicable strictures imposed by the Sixth Amendment as reflected in *Blakely*, *Cummingham*, and *Gomez II*. Because state-law grounds have eliminated the use of the only *Blakely*-infirm factor, and we are confident that our de novo determinations will be *Blakely* compliant, we encounter no issues of waiver and plain error.

In the present case, wherein the defendant was sentenced under the pre-2005 amendment to the sentencing law, the actually imposed Range I felony sentences *vis a vis* the sentencing ranges and presumptive – or "maximum" sentences according to *Blakely* and *Cunningham* – are as follows:

Offense/Count	Class	Sentence Imposed	Range	Presumptive Sentence
aggravated kidnapping (1)	B	8	8 to 12	8
aggravated kidnapping (2)	B	10	8 to 12	8
aggravated rape (4)	A	17	15 to 25	20
theft (5)	E	2	1 to 3	1.

See T.C.A. §§ 40-35-111(b)(2), -112(a)(2) (2003) (establishing sentencing range of eight to 12 years for Class B, Range I); *id.* § 40-35-210(e) (establishing a presumptive sentence of eight years for Class B, Range I); *id.* §§ 40-35-111(b)(1), -112(a)(1) (2003) (establishing sentencing range of 15 to 25 years, for Class A, Range I); *id.* § 40-35-210(e) (establishing a presumptive sentence of 20 years for Class A, Range I); *id.* §§ 40-35-111(b)(5), -112(a)(5) (2003) (establishing sentencing range of one to three years for Class E, Range I); *id.* § 40-35-210(e) (establishing a presumptive sentence of one year for Class E, Range I).[3]

As can be seen, the only sentences that the trial court enhanced above the maximum for Sixth Amendment purposes were the ten-year sentence for aggravated kidnapping in Count (2) and the two-year sentence for theft in Count (5).

Neither the trial court nor this court has applied enhancement factor (17) – that the crime was committed under circumstances under which the potential for bodily injury to a victim was great – to the sentence for aggravated kidnapping in Count (2). Although state-law grounds did not exclude the use of factor (17) for sentencing on Count (5), theft, we conclude above that the use of factor (2) alone justified the one-year enhancement on that count. Thus, we disregard enhancement factor (17) as meaningless in terms of *Blakely* compliance in our de novo sentencing.

We turn to the use of factor (2). As we have stated above, the use of a prior *conviction* by a court to enhance a sentence is not barred by the Sixth Amendment. *See Blakely*, 542 U.S. at 301, 124 S. Ct. at 2536. In the present case, evidence introduced at trial showed that the defendant had been convicted in Florida of 1998 possessions of marijuana and cocaine, apparently misdemeanors. Accordingly, via both the recidivism and the "admission" exceptions to the *Blakely* principles, factor (2) is constitutionally and factually applicable to sentencing on Counts (2) and (5), the sentences that exceed the respective presumptive sentences.

As we have indicated above, upon our de novo review, factor (2) justifies the enhancement of the sentence in Count (2) from eight to ten years and the enhancement of the sentence in Count (5) from one to two years.

IV. Conclusion

In view of the foregoing analyses, the defendant's convictions and sentences are affirmed.

JAMES CURWOOD WITT, JR., JUDGE

[3] Count three was dismissed.